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Supreme Court of the United States

OCTOBER TERM, 1934.

NO. 439

WILOIL CORPORATION, Appellant,

v.

COMMONWEALTH OF PENNSYLVANIA.

Appeal From the Supreme Court of Pennsylvania.

BRIEF FOR APPELLANT.

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A.

Official Reports of Opinions in the Courts Below.

The opinion of the Supreme Court of Pennsylvania is reported in 316 Pa. 33, Advanced Reports of October 12, 1934, also appears (R. 50), also reported in 173 Atlantic Reporter 404.

The opinion of the Court of Common Pleas of Dauphine County appears (R. 35), and is reported in 37 Dauphin County Reports, 63.

B.

At the time application was made for allowance of appeal, paragraph 1 of Rule 12 was complied with, the required printed copies were filed, styled "Statement as to Jurisdiction," and therefore, as we understand Rule 27-2 (c), it is unnecessary to include the same here.

For the convenience of the Court, however, since the record was not printed at the time the "Statement

as to Jurisdiction" was filed, we here give the following with record references.

Date of Judgment and Date of Application for Appeal.

Opinion and judgment of the State Supreme Court was entered June 30, 1934 (R. 50-57). Petition for reargument in accordance with the rules of said Court was duly presented and reargument refused on July 12, 1934 (R. 57). Application for Appeal, including assignments of error, was presented on September 4, 1934 (R. 63). Filed Sept. 7, 1934.

Constitutional Question Was Raised in All the Courts Below.

Appellant claimed in all the Courts below and before the taxing authorities that said taxing act as so applied was unconstitutional in that the imposition of such a tax was in violation of the commerce provision of the Federal Constitution, Article I, Section 8, Clause 3, in that it constituted an undue burden upon interstate commerce.

That such questions were timely raised is evidenced by the introductory statement of Commonwealth's counsel (R. 4); introductory statement of appellant's counsel (R. 16); opinion of the Court of Common Pleas of Dauphin County (R. 35); said Court's second conclusion of law (R. 47), and opinion of the State Supreme Court (R. 50).

Ruling of the Courts Below.

The ruling of the Common Pleas Court of Dauphin County was—2nd conclusion of law (R. 47):

> "The interstate commerce law is not involved in the instant case."

Judgment was in favor of the Commonwealth.

Affirming the judgment of the Common Pleas Court, the Supreme Court of Pennsylvania ruled that interstate commerce was only incidental and that the imposition of said tax did not therefore constitute a burden upon interstate commerce, applying as analogous the State income tax cases, brokers' license cases, and other like cases. (State Supreme Court's opinion, 173 Atl. Rep. 404, 316 Pa. 33, and R. 50).

The second question raised in and discussed by the Courts below, to wit,

> That under the terms of the contract of sale title passed to the purchaser at Wilmington, Delaware,

is not raised here as being a State question except as the same facts and conclusions may relate to the Federal question involved.

Reference to Cases Believed to Sustain Jurisdiction.

For cases believed to sustain jurisdiction reference is made to cases cited on pages 5 to 8 of "Statement as to Jurisdiction" printed and filed under the requirements of paragraph 1 of Rule 12. See same cases cited and quoted pages 9 and 10 herein.

Since the question of interstate commerce goes to the merits, as well as to the jurisdiction, such cases are cited hereafter in the argument on the merits.

C.

Statement of the Case.

Commonwealth of Pennsylvania assessed a tax against appellant claiming authority to do so under the provisions of the Liquid Fuels Tax Act of 1931, P. L. 149, Sections 2 and 4, *Purdon's Pennsylvania Statutes Annotated Title 72,* Sections 2611 (b) and (d) Pocket Supplement.

Material portions of said Act are quoted in the appendix hereto and other sections of the Act are there digested.

The State Courts upheld the tax, assigning as reason (Common Pleas Court) that the liquid fuels had come to rest—(State Supreme Court) that interstate commerce was only incidental.

Appellant contended throughout that the tax was illegal because it imposed an undue burden upon interstate commerce.

The liquid fuels taxed were brought into Pennsylvania from Wilmington, Delaware, consigned by the appellant (seller) direct to the purchaser, consignee, in tank-cars (original packages), at its private siding, Philadelphia, Pennsylvania, in fulfillment of a contract of sale previously entered into. The Courts below so found. Findings of fact Common Pleas Court of Dauphin County 1 to 6 (R. 35) and particularly findings of fact 3, 5, 6 (R. 35) to wit:

> "3. While the order in this case was for ten cars only one car a day was shipped to the purchaser, the arrangement being that the purchaser should call upon the defendant when they wanted these tank-car shipments."
>
> "5. It was stipulated that other shipments of liquid fuels sold by the defendant to the Ace Oil Corporation and High Powered Gasoline Company

were similarly made and that it would not be necessary to offer proof thereof."

"6. The liquid fuels sold by the defendant to Ace Oil Corporation and High Powered Gasoline Company were purchased by the defendant from the Crane Hook Company of Wilmington, Dela., and were shipped to the consignee on order of the defendant."

Mr. Justice Schaffer, in the opinion of the State Supreme Court states [R. 51]:

"* * * To fill the orders taken by its agent appellant obtained the gasoline from the Crane Hook Company in Wilmington, Delaware. Shipments were made direct from Wilmington to the purchasers in Philadelphia or Essington, Pennsylvania. In each instance the car containing the gasoline moved under a bill of lading showing appellant as consignor and either one or the other of the two purchasing concerns as consignee. The place of shipment was indicated as Wilmington, and of destination as Philadelphia, or Essington, consignee's private sidings. Freight was not prepaid and the consignee paid it. * * *"

The evidence supporting the above is documentary, appellant's Exhibit 3 (R. 32), being the contract of sale, and appellant's Exhibit 4 (R. 33), showing that shipments were made in compliance with the contract of sale.

[NOTE: Exhibits 3 and 4 are in the name of Willock Oil Corporation. By due proceedings the name was changed to Wiloil Corporation (R. 5)]

Ink notations on said exhibit 3 show dates tank cars were shipped [R. 32] [R. 26].

D.

Assignments of Error.

The Supreme Court of Pennsylvania erred—

1. In holding that the tax assessed against Wiloil Corporation (seller of the taxed goods) by the Commonwealth of Pennsylvania under the provisions of the Pennsylvania Liquid Fuels Tax Act of 1931, P. L. 149, *Purdon's Pennsylvania Statutes Annotated,* Title 72, Section 2611 (b) and (d) supplement, did not constitute an undue burden upon interstate commerce and was not in violation of Article 1, Section 8, Clause 3 of the Federal Constitution; the goods taxed having been brought into Pennsylvania in fulfillment of a contract of sale previously entered into and having been delivered by railroad carriers direct to the purchaser in tank-car lots (original packages).

2. In holding that interstate commerce was only incidental to the transaction and not a part of it.

3. In holding that under the terms of the contract appellant, Wiloil Corporation (the seller), was not required to make interstate shipments but could have fulfilled the contract by making shipments from any other point, including points in Pennsylvania, and therefore that interstate commerce was only incidental.

4. In *not* holding that even if the terms of the contract as to point of shipment were not obligatory upon the seller, Wiloil Corporation, nevertheless shipments made to fulfill the contract were in interstate commerce until the contract

of sale previously entered into was consummated, and the taxing of the goods against the seller while in interstate commerce was in violation of the interstate commerce provision of the Federal Constitution.

5. In affirming the judgment of the Court of Common Pleas of Dauphin County, Pennsylvania.

ARGUMENT.

The facts we believe are sufficiently stated in the "Statement of the Case," pages 4 and 5 herein, and reference is made thereto.

They, we believe, conclusively show that the tax was imposed upon goods while in interstate commerce, having been brought into the State in tank-car lots (original packages) in fulfillment of contracts of sale previously entered into.

The Commonwealth of Pennsylvania claimed authority to tax under the provisions of the Liquid Fuels Tax Act of 1931, P. L. 149, Sections 2 and 4, *Purdon's Pennsylvania Statutes Annotated,* Title 72, sections 2611 (b) and (d) Pocket Supplement.

The material part of the title of the Act is:

"Imposing a State tax, payable by those herein defined as distributors on liquid fuels used or sold and delivered within the Commonwealth, * * *."

(page 154):

"Section 4. Imposition of Tax; * * * A State tax of three cents a gallon, or fractional part thereof, is hereby imposed and assessed upon all liquid fuels used or sold and delivered by distribu-

tors within this Commonwealth, excepting liquid fuels delivered to the United States government on presentation of a duly authorized United States government exemption certificate or other evidence satisfactory to the department, and such liquid fuels used or sold and delivered as are not within the taxing power of this Commonwealth under the Commerce Clause of the Constitution of the United States. * * *"

(pages 150-151):

"Section 2 * * *

'Distributor.' Any person, as herein defined, who or which—

1. Produces, refines, prepares, blends, distils, manufactures, or compounds liquid fuels in the Commonwealth of Pennsylvania for his own use therein, or for sale and delivery therein.

2. Imports or causes to be imported from any other state or territory of the United States, or from a foreign country, liquid fuels for his own use in the Commonwealth of Pennsylvania, or for sale and delivery in and after reaching the Commonwealth, other than in the original package, receptacle, or container.

3. Imports or causes to be imported from any other state or territory of the United States liquid fuels for his own use in the Commonwealth of Pennsylvania, or for sale and delivery therein, after the same have come to rest or storage therein, whether or not in the original package, receptacle, or container.

4. Purchases or receives liquid fuels in the original package, receptacle, or container in the Commonwealth of Pennsylvania for his own use, or for sale and delivery therein, from any person who has imported the same from a foreign country.

5. Purchases or receives liquid fuels in the original package, receptacle, or container in the Commonwealth of Pennsylvania for his own use therein, or for sale and delivery therein, from any person who has imported the same from any other state or territory of the United States, in case such liquid fuels have not, prior to such purchase or receipt, come to rest or storage in the Commonwealth of Pennsylvania.

6. Receives and, in any manner, uses or distributes liquid fuels in the Commonwealth of Pennsylvania on which the tax provided for in this act has not been previously paid."

Material portions of the Act appendix p. 30 herein.

The taxing authorities applied the taxing statute in the instant case in violation of the Federal Constitution and the State Courts upheld the tax. Section 6 above may be construed and applied in a constitutional or unconstitutional sense.

Fiske v. Kansas, 274 U. S. 380, 385, 71 L. Ed. 1108-1111. The Court in that case stated (U. S. Rep. 385, L. Ed. 1111):

"A decision of a state court applying and enforcing a state statute of general scope against a particular transaction as to which there was a distinct and timely insistence that if so applied, the statute was void under the Federal Constitution, necessarily affirms the validity of the statute as so applied, and the judgment is, therefore, reviewable by writ of error under § 237 of the Judicial Code.
* * *

The inquiry, then, is whether the statute is constitutional as applied and enforced in respect of the situation presented. *Ward & Gow v. Krinsky,*

259 U. S. 503, 510, 66 L. ed. 1033, 1036, 28 A. L. R. 1207, 42 Sup. Ct. Rep. 529; *Cudahy Packing Company v. Parramore,* 263 U. S. 418, 422, 68 L. ed. 366, 368, 30 A. L. R. 532, 44 Sup. Ct. Rep. 153, 23 N. C. C. A. 744. And see *St. Louis, I. M. & S. R. Co. v. Wynne,* 224 U. S. 354, 359, 56 L. ed. 799, 800, 42 L. R. A. (N. S.) 102, 32 Sup. Ct. Rep. 493."

Concordia Fire Ins. Co. v. Illinois, 292 U. S. 535, 78 L. Ed. 1411 (1934). Opinion by Mr. Justice Van Devanter. Constitutional question; denial of equal protection; Fourteenth Amendment. State authorities assessed foreign corporations at greater values than domestic corporations although the taxing act itself did not call for such discrimination.

U. S. page 545, Law Ed. 1418:

"* * * The act deals specially and only with the taxation of net receipts of foreign fire, marine and inland navigation insurance corporations. The assessing officers acted in virtue of it and the state court held their action was valid under it. Thus both applied it, and they applied it as subjecting the net receipts of a foreign fire insurance company, by reason of being such, to a tax burden 66 2/3% greater than that laid on other personal property. No reasonable basis for such a discrimination is suggested and none is perceived. It is essentially the same character of arbitrary and prejudicial discrimination that was condemned as a denial of the equal protection of the laws in *Hanover F. Ins. Co. v. Harding* (*Hanover F. Ins. Co. v. Carr*), 272 U. S. 494, 71 L. Ed. 372, 47 S. Ct. 179, 49 A. L. R. 713.

Whether a state statute is valid or invalid under the equal protection clause of the Fourteenth Amendment often depends on how the statute is

construed and applied. It may be valid when given a particular application and invalid when given another. Here the application which was made of § 30 in respect of the taxation of the net receipts of 1927, *i. e.,* the application made by the assessing officers and sustained by the Supreme Court, brought the section into conflict with the prohibition of that clause. This means that as so applied it is invalid, notwithstanding its validity in some different applications."

> *Dahnke-Walker Milling Co. v. Bondurant,* 257 U. S. 282, 288-289, 66 L. Ed. 239, 242-243 (1921).

The above three cases are jurisdictional cases and are cited in appellant's "Statement as to Jurisdiction" originally filed and referred to but are again cited here for the convenience of the Court and to explain appellant's contention as to jurisdiction.

The act as so applied in the instant case is unconstitutional.

The propositions that will be argued are—

I.

THE GOODS WERE IN INTERSTATE COMMERCE AND THE TAXING OF THEM AGAINST THE APPELLANT CONSTITUTED AN UNDUE BURDEN ON THAT COMMERCE.

II.

THE CONTRACTS OF SALE WERE HONESTLY ENTERED INTO AND WITH NO INTENT TO DEFRAUD THE STATE OF THE TAX.

The above will be argued in their order.

I.

THE GOODS WERE IN INTERSTATE COMMERCE AND THE TAXING OF THEM AGAINST THE APPELLANT CONSTITUTED AN UNDUE BURDEN ON THAT COMMERCE.

We believe the tax imposed is a tax on property. The Supreme Court of Pennsylvania in *Commonwealth v. Pure Oil Company,* 303 Pa. 112-116, held that the tax imposed by the Act of 1929, P. L. 1037, Section 3 was a tax on property. Material part of the title of said Act of 1929 is:

"Imposing a State tax on liquid fuels, * * *"

Section 3 of said Act imposing the tax is in effect identical with Section 4 of the said Act of 1931, P. L. 149.

Dawson v. Kentucky Distilleries Co., 255 U. S. 288, 294, 65 L. Ed. 638, 646.

But whether it be a tax on property or an excise tax, if it imposes an undue burden upon interstate commerce it is unconstitutional.

Minnesota v. Blasius, 290 U. S. 1, 78 L. Ed. 131, Opinion by Mr. Chief Justice Hughes (1933).

(U. S. Rep. 9, Law. Ed. 135):

"* * * Thus, the States cannot tax interstate commerce, either by laying the tax upon the business which constitutes such commerce or the privilege of engaging in it, or upon the receipts, as such, derived from it. Similarly, the *States may not tax property in transit in interstate commerce.* But, by reason of a break in the transit, the property may come to rest within a State and become subject to the power of the State to impose a nondiscriminatory property tax." (Italics ours).

The facts in this case show conclusively that the shipments of the gasoline were made in interstate commerce and continued in interstate commerce until they were received by the purchaser in Pennsylvania, in whose hands they came to rest and were taxable against the purchaser and not the seller, appellant in this case.

The decisions of this Court are uniformly to the effect that interstate commerce continues until the goods are received by the consignee, purchaser, if the goods were brought in in fulfillment of a contract of sale previously entered into.

That the goods were brought in in fulfillment of a contract of sale previously entered into is also conclusively shown by the Common Pleas Court's findings of fact, quoted pages 4-5 herein, and by the statements of fact of the State Supreme Court (quoted page 5 herein) and evidenced by the contract of sale, appellant's Exhibit 3 (R. 32), and the bill of lading, appellant's Exhibit 4 (R. 33).

In *Sonneborn Brothers v. Keeling* (Cureton), 262 U. S. 506, 67 L. ed. 1095, Mr. Chief Justice Taft, after carefully reviewing numerous cases including *Brown v. Maryland,* 12 Wheat. 419, 6 L. ed. 678, *Woodruff v. Parham,* 8 Wall. 123, 19 L. Ed. 382, *Standard Oil Company v. Graves,* 249 U. S. 389, 63 Law. Ed. 662; *Askren v. Continental Oil Company,* 252 U. S. 444, 64 Law. Ed. 654; *Bowman v. Continental Oil Company,* 256 U. S. 642, 65 Law. ed. , 1139, *Texas Company v. Brown,* 258 U. S. 466, 66 Law. Ed. 721, concluded (U. S. Reps. 515—Law. Ed. 1100):

> "Many of the sales by the appellants were made by them before the oil to fulfil the sales was sent to Texas. These were properly treated by the state authorities as exempt from state taxation.

They were, in effect, contracts for the sale and delivery of the oil across state lines. The soliciting of orders for such sales is equally exempt. Such transactions are interstate commerce in its essence, and any state tax upon it is a regulation of it and a burden upon it. *Robbins v. Shelby County Taxing Dist.,* 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; *Asher v. Texas,* 128 U. S. 129, 32 L. ed, 368, 2 Inters. Com. Rep. 241, 9 Sup. Ct. Rep. 1; *Stoutenburgh v. Hennick,* 129 U. S. 141, 147, 32 L. ed. 637, 638, 9 Sup. Ct. Rep. 256; *Caldwell v. North Carolina,* 187 U. S. 622, 47 L. ed. 336, 23 Sup. Ct. Rep. 229; *Rearick v. Pennsylvania,* 203 U. S. 507, 51 L. ed. 295, 27 Sup. Ct. Rep. 159; *Brennan v. Titusville,* 153 U. S. 289, 38 L. ed. 719, 4 Inters. Com. Rep. 658, 14 Sup. Ct. Rep. 829; *Dozier v. Alabama,* 218 U. S. 124, 54 L. ed. 965, 28 L. R. A. (N. S.) 264, 30 Sup. Ct. Rep. 649; *Crenshaw v. Arkansas,* 227 U. S. 389, 57 L. ed. 565, 33 Sup. Ct. Rep. 294; *Stewart v. Michigan,* 232 U. S. 665, 58 L. ed. 786, 34 Sup. Ct. Rep. 476; *Western Oil Ref. Co. v. Lipscomb,* 244 U. S. 346, 61 L. ed. 1181, 37 Sup. Ct. Rep. 623."

And again U. S. Reps. page 519—Law. Ed. 1102:

"* * * As to the excise tax, the court directed the injunction to issue with respect to the imposition upon 'sales of gasolene brought from without the state into the state of New Mexico, and there sold and delivered to customers in the original packages, whether tank-cars, barrels, or other packages, and in the same form and condition as when received by plaintiff in that state.' If this covered gasolene that was ordered by the purchaser before importation, it was right. If it covered gasolene, whether in original packages or not,

which was sold after it reached its destination, then it is not in accord with the law as we understand it to be under the authorities we have cited."

There is nothing in the instant case to indicate in the least that the goods had come to rest, or that they were brought in by the appellant for the purpose of future sale, or that the original packages were broken up, or that there was an interruption in transit.

Nor was there ever any such claim by the Commonwealth although the Common Pleas Court did conclude erroneously however that the goods had come to rest (argued page 16 herein).

The goods were brought in in fulfillment of a contract of sale previously entered into and Mr. Chief Justice Taft makes it clear in the above opinion that in such a case interstate commerce continues until the goods are received by the consignee and that a tax (property or excise) imposed during that commerce is a burden upon it and is illegal.

Tank-cars are original packages.

Askren v. Continental Oil Co., 252 U. S. 444, 449, 64 Law. Ed. 654.

The State Courts held that title passed at Philadelphia, Pennsylvania. The passing of title, however, does not affect the interstate commerce question.

Pennsylvania Railroad Company v. Clark Bros. Coal Company, 238 U. S. 456, 465, bottom of page:

"In determining whether commerce is interstate or intrastate, regard must be had to its essential character. Mere billing or the place at which title passes is not determinative."

Comments Upon the Opinions and Conclusions of the State Courts in the Instant Case.

(1) *As to the Common Pleas Court of Dauphin County*—That Court concluded—2nd conclusion of law (R. 47):

> "The interstate commerce law is not involved in the instant case."

and based that conclusion on its 1st conclusion (R. 47):

> "The sale and delivery of the liquid fuels in question were made and delivered to the purchasers in Pennsylvania where the liquid fuels so purchased 'came to rest.'"

It is true said 1st conclusion does not state in whose hands the liquid fuels came to rest, but resort to the opinion and the judgment of that Court convinces that the Court intended to state that the goods came to rest in the hands of the seller, appellant.

A glance at the contract of sale, appellant's Exhibit 3 (R. 32), and the bill of lading, appellant's Exhibit 4 (R. 33) will show that such a conclusion was impossible both from a legal and physical standpoint.

In the bill of lading appellant, seller, was named the consignor, the purchaser the consignee, and the State Supreme Court states in its opinion, 316 Pa. top of page 35,

> "The place of shipment was indicated as Wilmington, and the destination as Philadelphia or Essington, *consignee's private sidings.*"

Said bill of Lading was in compliance with the Federal Bills of Lading Act of August 29, 1916, Chapter 415, 39 Statutes 538, U. S. C. A. Title 49, Section 82.

Said bill is entitled: "Uniform Straight Bill of Lading, Not Negotiable."

Section 82 of said Bills of Lading Act defines a "straight bill of lading" as follows:

> "A bill in which it is stated that the goods are consigned or destined to a specified person is a straight bill."

Said Act further provides that a straight bill of lading is non-negotiable and must be so noted on the bill.

Section 122 defines consignee named in the bill as

> "the person to whom delivery of the goods is to be made."

The railroad company made delivery exactly as required by said bill.

It is apparent that the State Supreme Court realized that the Common Pleas Court's position was untenable and it therefore sought another ground, to wit, that interstate commerce was incidental only, which ground we feel confident is equally untenable.

(2) *As to the State Supreme Court's Opinion and Conclusions—*

The contract of sale, appellant's Exhibit 3 (R. 32), (repeating for emphasis), sets forth that shipments of a particular kind of gasoline were to be made from Wilmington, Delaware over the Reading Railroad to Philadelphia.

The State Supreme Court held that the appellant was not required to ship from Wilmington, Delaware, under the terms of the contract, but could have shipped the gasoline from any point it saw fit, including points

in Pennsylvania, and, therefore, for that reason interstate commerce was only incidental.

(a) The State Court was deciding a Federal question and its conclusion as to the effect of the contract was erroneous, and

(b) Even if the appellant could have made shipments from points in Pennsylvania at its election the fact nevertheless remains that the shipments were made from Wilmington, Delaware.

(a) THE STATE SUPREME COURT WAS IN ERROR AS TO THE EFFECT OF THE CONTRACT.

The State Supreme Court was passing ultimately upon the question of interstate commerce.

When a Federal right is involved, this Court will examine both fact and law to ascertain whether or not that right has been violated regardless of the State Court's action.

Carpenter v. Shaw, 280 U. S. 363, bottom of page 367, 74 Law Ed. 478 at page 482. Opinion by Mr. Justice Stone:

> "Where a Federal right is concerned, we are not bound by the characterization given to a State tax by State courts or legislatures, or relieved by it from the duty of considering the real nature of the tax and its effect upon the Federal right asserted." [Citing cases]

Fiske v. Kansas, 274 U. S. 380, 385, 71 L. Ed. 1108-1111. Opinion by Mr. Justice Sanford:

> "And this court will review the finding of facts by a state court where a Federal right has been

denied as the result of a finding shown by the record to be without evidence to support it; *or where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts.*"

Further, the State Supreme Court was construing and applying (erroneously we claim) decisions of this Court as evidenced by the citations in its opinion.

Comments on these decisions showing their inapplicability to the instant case will be made later in this argument. (Page 23 herein).

That the appellant was not bound by the terms of its contract is contrary to the law announced by this Court.

Appellant was bound to perform strictly in accordance with the terms of its contract or suffer the possibility of repudiation.

Norrington v. Wright, 115 U. S. 188 (1885), 29 L. Ed. 366 (Opinion by Mr. Justice Gray, U. S. Rep., page 203, L. Ed. 368):

"* * * The time of shipment is the usual and convenient means of fixing the probable time of arrival, with a view of providing funds to pay for the goods, or of fulfilling contracts with third persons. A statement descriptive of the subject-matter, or of some material incident, such as the time or place of shipment, is ordinarily to be regarded as a warranty, in the sense in which that term is used in insurance and maritime law, that is to say a condition precedent, upon the failure or nonperformance of which the party aggrieved

may repudiate the whole contract. *Behn v. Burness,* 3 B. & S. 751; *Bowes v. Shand,* 2 App. cas. 455; *Lowber v. Bangs,* 2 Wall. 728; *Davison v. von Lingen,* 113 U. S. 40."

Filley v. Pope, 115 U. S. 213 (1885), 219, 29 L. Ed. 372;

Shepard's Citations show that the said cases have been cited with approval many times;

Mitsubishi Goshi Kaisha v. J. Aron & Co., Inc. (1926), 16 F. (2d) 185-186.

The rule of substantial performance would not have protected the appellant had it elected to ship from some other point and the shipments had been delayed for an unreasonable time beyond the average time from Wilmington, Delaware, to Philadelphia.

(b) EVEN IF THE APPELLANT COULD HAVE MADE SHIPMENTS FROM POINTS IN PENNSYLVANIA AT ITS ELECTION THE FACT NEVERTHELESS REMAINS THAT SHIPMENTS WERE MADE FROM WILMINGTON, DELAWARE.

Assuming, however, for the purpose of argument that appellant was not bound to perform according to the terms of the contract and at its election could have shipped gasoline from points in Pennsylvania, nevertheless the fact remains that it did ship from Wilmington, Delaware, to Philadelphia, which was interstate commerce, and continued to be so until the goods were received by the purchaser on its private siding.

Western Union Telegraph Co. v. Foster, 247 U. S. 105 (1917) at page 113, 62 L. Ed. 1006 at 1015. Mr. Justice Holmes:

"Thus lumber purchased in Texas for the purpose of filling foreign orders was held to be carried in interstate commerce, although no contract prevented the purchaser from giving it a different destination. * * * It is admitted that the transmission from New York to Massachusetts by the Telegraph Company was interstate commerce. If so, it continued such until it reached the point where the parties originally intended that the movement should finally end.' *Illinois Central R. R. Co. v. Louisiana R. R. Commission,* 236 U. S. 157, 163."

Eureka Pipe Line Co. v. Walter S. Hallanan, 257 U. S. 265-272, 66 L. Ed. 227-232.

Federal Trade Commission v. Pacific States Paper Trade Association, 273 U. S. 52, 71 L. Ed. 534. Opinion by Mr. Justice Butler.

(U. S. Rep. 63—Law. Ed. 538):

"* * * The seller is free to have delivery made from any source within or without the state. * * * The question is whether the sale by the wholesaler to the retailer in the same state is a part of interstate commerce where, subsequently at the instance of the seller and to perform his part of the contract, the paper is shipped from a mill in another state to or for the retailer. * * *"

(U. S. Rep. 64—Law. Ed. 539):

"* * * And what is or is not interstate commerce is to be determined upon a broad consideration of the substance of the whole transaction. *Dozier v. Alabama,* 218 U. S. 124, 128, 54 L. ed. 965, 967, 28 L. R. A. (N. S.) 264, 30 Sup. Ct. Rep. 649. Such commerce is not confined to transportation,

but comprehends all commercial intercourse between different states and all the component parts of that intercourse. And it includes the buying and selling of commodities for shipment from one State to another. *Dahnke-Walker Mill. Co. v. Bondurant,* 257 U. S. 282, 290, 66 L. ed. 239, 243, 42 Sup. Ct. Rep. 106; *Lemke v. Farmers' Grain Co.,* 258 U. S. 50, 55, 66 L. ed. 458, 462, 42 Sup. Ct. Rep. 244. The absence of contractual relation between the manufacturer and retailer does not matter. The sale by the wholesaler to the retailer is the initial step in the business completed by the interstate transportation and delivery of the paper. Presumably the seller has then determined whether his source of supply is a mill within or one without the state. *If the contract of sale provided for shipment to the purchaser from a mill outside the state, then undoubtedly it would be an essential part of commerce among the states. Sonneborn Bros. v. Cureton (Sonneborn Bros. v. Keeling),* 262 U. S. 506, 515, 67 L. ed. 1095, 1100, 43 Sup. Ct. Rep. 643. *Clearly the absence of such a provision does not affect the substance of the matter when in fact such a shipment was contemplated and made. Cf. Dozier v. Alabama, supra; Western U. Teleg. Co. v. Foster,* 247 U. S. 105, 113, 62 L. ed. 1006, 1015, 1 A. L. R. 1278, P. U. R. 1918D, 865, 38 Sup. Ct. Rep. 438; *Lemke v. Farmers' Grain Co., supra,* 55 (66 L. ed. 462, 42 Sup. Ct. Rep. 244). *The election of the seller to have the shipment made from a mill outside the state makes the transaction one in commerce among the States. And on these facts the sale by jobber to retailer is a part of that commerce."* [Italics ours.]

The State Supreme Court seemed to attach some importance to the fact that appellant and purchaser

were both citizens of the same state. We submit that citizenship does not enter into the determination of the question of interstate commerce.

> *Bacon v. Illinois,* 227 U. S. 504, 57 Law. Ed. 615. (Syllabi 2):
>
> "The state cannot impose a tax upon articles moving in interstate commerce on the ground that such articles belong to its own citizens. They as well as others are under the protection of the commerce clause of the Constitution."

The Cases Relied on by the State Courts Are Clearly Not Analogous.

Banker Bros. v. Commonwealth of Pennsylvania, 222 U. S. 210, 56 L. Ed. 168 (1911) is, in our opinion, clearly not in point. The tax in that case was imposed against Banker Bros. Company under authority of the Act of 1899, P. L. 184, known as the Mercantile Tax Act. The Act imposed an annual fee or a license tax upon merchants transacting business within the State and an additional tax based upon the amount of business transacted within the State. It did not tax any particular property or property as a class or property in general. The tax was determined solely upon the value of the total business done within the State by merchants.

Banker Bros. were in the business of selling Pierce-Arrow automobiles in the City of Pittsburgh. They contracted generally with the Pierce-Arrow Company located at Buffalo, New York, to purchase said automobiles from that company. By the terms of the contract, Banker Bros. were required, upon ordering an automobile, to pay a certain amount on account of the purchase and the balance upon receipt of the car. The contract was between the Pierce Company and Banker

Bros. When a car was ordered by Banker Bros. from Pierce Company, and upon receipt of the initial payment, Pierce Company, in accordance with the general contract, would consign the car to Banker Bros. with a sight draft attached to the bill of lading for the balance of the purchase price. Banker Bros. thus paid for the car, took possession of it (no doubt serviced it), and later delivered it to their purchaser.

The main contention in the case was that Banker Bros. were acting as agents for Pierce Company in the sale of its cars and, therefore, the transaction was the same as if the final purchaser and user of the car had contracted directly with the Pierce Company. This Court held that the contract between Banker Bros. and Pierce Company was not a contract of agency and that there were two distinct transactions,—a purchase by Banker Bros. from Pierce Company, and a purchase from Banker Bros. by the user of the car. Under those circumstances, the car having been consigned to Banker Bros. and they having paid for it and taken it into their possession in Pennsylvania, the car had come to rest in their hands in Pennsylvania and this Court so held.

> (Opinion by Mr. Justice Lamar—U. S. Reps. page 213, Law Ed. 170):
>
> "* * * The Banker Brothers Company, on paying the draft, took up the bill of lading, received from the carrier an automobile which though shipped in interstate commerce had become at rest in the State of Pennsylvania."

Said case would be in point if the tax in the instant case had been assessed against appellant's purchaser and not appellant, and appellant's purchaser were here resisting the tax.

Furthermore, we submit that said Banker Bros. Company case, if it ever was applicable, is clearly overruled as to the instant case by *Sonneborn Bros. v. Keeling, supra,* quoted page 13 herein.

Hump Hairpin Mfg. Co. v. Emmerson, 258 U. S. 290, 66 L. Ed. 622. The tax involved in that case was a privilege tax assessed by the State of Illinois against a West Virginia corporation doing business in the State of Illinois.

Ware & Leland v. Mobile County, 209 U. S. 405, 52 L. Ed. 855. The tax in that case was a license tax imposed upon brokers engaged in the business of buying and selling futures for speculation or on commission. The taxpayer was a cotton broker. We think it is only necessary to state one fact appearing in the opinion—U. S. Rep. page 413, L. Ed. 859:

> "the stipulated facts show that when the orders transmitted are received in the foreign State the property is bought in that State and there held for the purchaser."

United States Glue Co. v. Oak Creek, 247 U. S. 321, 62 L. Ed. 1135, is a State income tax case and we believe no further comment is necessary.

Minnesota v. Blasius, 290 U. S. 1, 78 L. Ed. 131. The goods in that case were brought into Minnesota and were sold to the party taxed, who held them for future sale. The contention in that case was that the taxpayer contemplated a future sale of goods in interstate commerce.

Federal Compress & Warehouse Company v. McLean, 291 U. S. 17, 78 L. Ed. 622. Held that the tax accrued while the goods were in storage and before interstate commerce had begun.

II.

THE CONTRACTS OF SALE WERE HONESTLY ENTERED INTO AND WITH NO INTENT TO DEFRAUD THE STATE OF THE TAX.

This part of the argument is perhaps immaterial if it were not for the fact that the Courts sometimes refuse to aid the party against whom the tax is imposed if he has attempted to escape the tax by fraudulent means, even though the taxpayer claims constitutional protection.

There is no evidence of fraud of any kind and the Commonwealth so admitted (R. 25):

> "Well, there is no question of dishonesty, I want to say it right here, there is no question at all of dishonesty in this case."

The question of fraud would not be referred to here at all if it were not for the fact that the Courts below stated that the tax authorities discovered by means of an audit made some six months later that the gasoline had been brought into Pennsylvania, thus inferring that the Commonwealth was by reason of this delayed knowledge deprived of its opportunity to collect the tax from appellant's purchasers even if it had so desired.

The answer is that such a statement was not in any way justified because, as evidenced by documents and Commonwealth admissions,

(1) Appellants did report the shipments (Appellant's Exhibit 2, R. 31)

(2) The taxing authorities knew of these shipments as they were coming in.

That appellants did report the shipments to the Department of Revenue is evidenced by appellant's Exhibit 2 (R. 31) dated October 3, 1931, which report showed such shipments to be 111,345 gallons. The audit referred to by the Courts below was made May 10, 1932, more than five months after said Exhibit No. 2, and this audit showed exactly the same number of gallons as said letter (R. 10, 14) to wit 111,345 gallons.

That the Department of Revenue knew of these shipments as they came in is evidenced by admissions made by Mr. Fryburg, Assistant Commissioner of Liquid Fuels in charge of these transactions for the Commonwealth.

When Mr. Fryburg was asked if he knew about these shipments he stated (R. 14):

"A. We knew it from both parties.

Q. How did you know that from the Wiloil Corporation?

A. We were in consultation with Mr. Gahagan, the President of Ace Oil Company. He was an unregistered distributor, he asked permission to buy gasoline from you if he paid you the tax. We consented to that arrangement."

We submit that the Department of Revenue *has no authority to impose a tax except under the provisions of the Taxing Act and no consent arrangement, agreement, or the fact that both the appellant and the Department of Revenue misconstrued the Act, will justify the imposition of the tax against appellant.*

Mr. Fryburg also admitted that he knew of these shipments through the railroad carrier (R. 8):

"A. They are a tabulation record of the gallonage of the Wiloil says that they purchased, as

> against the gallonage that the shipper claims they shipped to the Wiloil; also the record that the railroad send us every month of the tank cars of gasoline that is delivered during the month to the various distributors."

If the Commonwealth has lost the tax it was through its own neglect and not through any fault of appellant. Furthermore, had the taxing authorities not misconstrued the tax and had claimed it against the purchasers as they should have done, they were in a position to bring extreme pressure upon the purchasers as Section 3 of the Act imposes severe penalties, fine, and/or imprisonment for failure to make returns and pay the tax.

Appellants, as required by the taxing act, became a permit holder but, being ignorant of the interstate commerce question, included the tax in its invoice to the purchaser.

A short time after the transactions were entered into appellant referred the contracts of sale to counsel and it was advised at that time that the appellant was not the taxpayer but that the purchasers were the parties liable under the act, and were further advised to notify the taxing authorities immediately of the interstate shipments. Appellant's notice, Exhibit 2 (R. 31) above referred to was the result of this advice.

Therefore, the taxing authorities were notified in ample time to have settled the tax against the purchaser, the proper taxpayer, if they had cared to do so, but it is evident that they themselves also overlooked the effect of interstate commerce and misapplied the act.

Wherefore, it is respectfully submitted that this case is rightfully before this Court on appeal and should be reversed, but if it should be determined that this Court is without jurisdiction on appeal, it is respectfully submitted that it is a case calling for the exercise by this Court of its supervisory powers and this Court should, on a writ of certiorari, review the decision of the Supreme Court of Pennsylvania and finally reverse it. The above is as originally petitioned. (See page 16 of the "Statement as to Jurisdiction").

The authority for certiorari is Section 237 (b & c) as amended by the Act of February 13, 1925, Chapter 229, 43 Statutes 937, U. S. C. A. Title 28, Section 344 (b & c). *Dahnke-Walker Milling Co. v. Bondurant,* 257 U. S. 282-287 bottom of page and page 293; 66 Law. Ed. 239, 242-245.

Respectfully submitted,

J. SMITH CHRISTY,
Attorney for Appellant.

APPENDIX.

Liquid Fuels Tax Act of 1931, P. L. 149, Purdon's Pennsylvania Statutes Annotated, Title 72, Section 2611 (b), (c), (d), (e) and (o).

Material part of the title of the act:

"Imposing a State tax, payable by those herein defined as distributors, on liquid fuels used or sold and delivered within the Commonwealth" * * *

Section 2 (p. 150):

" 'Distributor.' Any person, as herein defined, who or which—

1. Produces, refines, prepares, blends, distils, manufactures, or compounds liquid fuels in the Commonwealth of Pennsylvania for his own use therein, or for sale and delivery therein.

2. Imports or causes to be imported from any other state or territory of the United States, or from a foreign country, liquid fuels for his own use in the Commonwealth of Pennsylvania, or for sale and delivery in and after reaching the Commonwealth, other than in the original package, receptacle, or container.

3. Imports or causes to be imported from any other state or territory of the United States liquid fuels for his own use in the Commonwealth of Pennsylvania, or for sale and delivery therein, after the same have come to rest or storage therein, whether or not in the original package, receptacle, or container.

4. Purchases or receives liquid fuels in the original package, receptacle, or container in the Commonwealth of Pennsylvania for his own use,

or for sale and delivery therein, from any person who has imported the same from a foreign country.

5. Purchases or receives liquid fuels in the original package, receptacle, or container in the Commonwealth of Pennsylvania for his own use therein, or for sale and delivery therein, from any person who has imported the same from any other state or territory of the United States, in case such liquid fuels have not, prior to such purchase or receipt, come to rest or storage in the Commonwealth of Pennsylvania.

6. Receives and, in any manner, uses or distributes liquid fuels in the Commonwealth of Pennsylvania on which the tax provided for in this act has not been previously paid. * * *"

Section 3 (p. 152):

"Liquid Fuels Permit and Bond.

(a) On and after the effective date of this act, it shall be unlawful for any distributor to continue to engage in, or thereafter to begin to engage in, the use or sale and delivery of liquid fuels within this Commonwealth unless a liquid fuels permit or permits shall have been issued to him as hereinafter prescribed. * * *"

This section also provides penalties for violations, requires distributors to procure permits, and how the permits may be acquired.

Section 4 (p. 154):

"Imposition of Tax; Exemptions and Deductions.—A State tax of three cents a gallon, or fractional part thereof, is hereby imposed and assessed upon all liquid fuels used or sold and delivered by distributors within this Commonwealth, excepting liquid fuels, delivered to the United States government on presentation of a duly authorized

United States government exemption certificate or other evidence satisfactory to the department, and such liquid fuels used or sold and delivered as are not within the taxing power of this Commonwealth under the Commerce Clause of the Constitution of the United States: Provided, That the tax herein imposed and assessed shall be collected by and paid to the Commonwealth but once in respect to any liquid fuels.

Distributors shall be liable to the Commonwealth as taxpayers for the payment of the tax imposed by this act. * * *"

Section 5 (p. 155):

"By Whom Tax is Payable.—Every distributor using or delivering liquid fuels upon which a tax is imposed by this act shall pay the tax into the State Treasury, through the department, in the manner and within the time specified in this act; but whenever liquid fuels are delivered within the Commonwealth by one distributor to another distributor holding a permit under this act, the distributor receiving such liquid fuels shall separately show, in his monthly reports to the department, all such deliveries from each distributor, and shall pay the liquid fuels tax provided for by this act upon all such liquid fuels used or sold and delivered by him within this Commonwealth. The distributor making such deliveries shall separately show the same in his monthly reports to the department, and shall thereupon be exempt from the payment of the tax which would otherwise be imposed upon the liquid fuels so delivered. It shall be the duty of each distributor to furnish to the department such information concerning such deliveries as the department may require. The department shall furnish to any distributor, upon

request, a list of distributors holding permits under this act, and their addresses.

Distributors may add the amount of the tax to the price of liquid fuels sold by them, and shall state the rate of the tax separately from the price of the liquid fuels on all price display signs, sales or delivery slips, bills, and statements which advertise or indicate the price of liquid fuels. * * *"

Section 6 (p. 155):

"Distributor's Report and Payment of Tax.—For the purpose of ascertaining the amount of tax payable under this act, it shall be the duty of every distributor, on or before the last day of each month, to transmit to the department, upon a form prescribed, prepared, and furnished by the department, a report, under oath or affirmation, of the liquid fuels used or delivered by him within this Commonwealth during the preceding month. Such report shall show the number of gallons of liquid fuels used or delivered within the Commonwealth during the period for which it is made, and such further information as the department shall prescribe. A distributor having more than one place of business within this Commonwealth shall combine, in each report, the use or delivery of liquid fuels at all such separate places of business.

Every distributor, at the time of making every report required by this section, shall compute and pay to the department the tax due to the Commonwealth on liquid fuels used or sold and delivered by him during the preceding month, less a two per centum discount if the report is filed and the tax paid on time. The amount of all taxes imposed under the provisions of this act for each month shall be due and payable on the last day of the next succeeding month, and shall bear inter-

est at the rate of one per centum per month, or fractional part of a month, from the date they are due and payable until paid. * * *"

Section 15 (p. 161):

"Reports from Common Carriers.—Every person, including railroad companies, street, suburban and interurban, railway companies, pipe line companies, and water transportation companies, transporting liquid fuels in any manner, either in interstate or intrastate commerce, to a point within this Commonwealth from a point within or without the Commonwealth, shall report, under oath and affirmation, to the department, on or before the last day of each month, for the preceding month, all deliveries of liquid fuels made to points within this Commonwealth. * * *"